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IN THE

Supreme Court of The United States

No. 155
October Term, 1962

CLARENCE EARL GIDEON,
Petitioner,

v.

H. G. COCHRAN, JR., Director
Division of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of
The State of Florida

BRIEF FOR THE RESPONDENT

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v.

H. G. COCHRAN, JR., Director
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Respondent.

On Writ of Certiorari to the Supreme Court of
The State of Florida

STATEMENT OF THE CASE

On October 11, 1961, Clarence Earl Gideon, an inmate of the Florida State Prison at Raiford, filed a petition for writ of habeas corpus in the Supreme Court of Florida, alleging substantially as follows:

1. He was arrested on June 3, 1961, and charged with the crime of breaking and entering with intent to commit a misdemeanor, to wit, petit larceny.

2. He plead not guilty and was tried and convicted in the Circuit Court of Bay County, Florida, on August 4, 1961.

3. He was sentenced on August 25, 1961, to a term of five years in the State Prison.

4. At the time of trial he was without funds and without an attorney. He asked the trial court to appoint him an attorney but his request was denied. He told the court that the United States Supreme Court had ruled that the State of Florida should see that everyone who is tried for a felony should have legal counsel, but the court ignored this plea thereby allegedly denying him his rights under the 4th, 5th and 14th Amendments.

5. He sent a petition from the county jail of Bay County to the United States District Court at Tallahassee, Florida, but the Sheriff's office and officials refused to let it go out, contrary to the laws of the United States (R. 45-46).

The Petitioner did not recite any circumstances to show that the trial was unfair or that the charges against him were com-

plex. Nor did Petitioner allege that he was incapable of adequately making his own defense, by reason of any lack of mental capacity, education, experience, etc. On October 30, 1961, the Supreme Court of Florida denied the petition for habeas corpus without requiring a return, without a hearing, and without opinion (R. 47).

Thereafter, on January 8, 1962, Petitioner filed in this Court a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis*. Respondent filed an informal *Response* to the petition.[1] On June 4, 1962, this Court entered an order granting the motion and the petition for certiorari. In addition to other questions presented by this case, counsel were requested to discuss the following in their briefs and oral argument: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" (R. 47-48).

Petitioner's Designation For Printing, directed that the formal record and the reporter's transcript of trial proceedings in the Circuit Court of Bay County, Florida, be printed and included in the record in this cause.[2] Respondent moved to strike those paragraphs of Petitioner's designations pertaining to the trial proceedings in Bay County,[3] since the trial record and transcript were not before the Florida Supreme Court[4] and are not, there-

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1. *Response To Petition For Writ Of Certiorari*, filed April 9, 1962.
2. *Petitioner's Designation For Printing*, paragraphs 1 and 2, p. 1.
3. *Respondent's Motion To Strike Paragraphs 1 and 2 Of Petitioner's Designation For Printing*, filed August 31, 1962.
4. Attached to *Respondent's Motion To Strike* is a certificate of the Honorable Guyte P. McCord, Clerk of the Supreme Court of Florida, to the effect that "no pleadings, transcripts, documents or papers," were before that Court, other than the

fore, incorporated in the judgment being reviewed in the present certiorari proceeding.[3] On October 15, 1962, an order was entered denying the motion of Respondent. The trial record and transcript of proceedings have been included in the printed record before this Court (R. 1-44).

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petition for habeas corpus filed by Petitioner on October 11, 1961, and the order of the Florida Supreme Court denying said petition, filed on October 30, 1961. He also certified that "the trial record and transcript in the case of State v. Gideon in the Circuit Court of Bay County, Florida, August, 1961, have never been and are not now a part of the record which was considered by the Florida Supreme Court in denying Gideon's petition for writ of habeas corpus in October, 1961."

5. We quote, as follows, from *Respondent's Motion To Strike*, *supra* note 3 at p. 3:

> "The Florida Court did not have before it the transcript of trial proceedings and formal record in the Circuit Court of Bay County, Florida, which petitioner seeks to include in the printed record in the instant cause, and that Court denied Gideon's petition for habeas corpus on the basis that the bare allegations contained therein were insufficient as a matter of law. The trial papers are not needed by petitioner to prove the allegations of the petition, since respondent has admitted that those allegations must be taken as true. Matters which took place at the trial which were not alleged in the petition for habeas corpus are not involved in the instant case, and therefore have no place in the printed record. For these reasons, inclusion of the trial papers in the printed record herein would be unnecessary and improper."

QUESTIONS PRESENTED BY THE PETITION IN THE FLORIDA SUPREME COURT

In his petition for habeas corpus, Gideon alleged that (1) he was denied counsel and (2) the "sheriff's office and officials" of Bay County refused to send a "petition" he had drawn to the United States District Court at Tallahassee, Florida. Point (2) has not been briefed and is evidently abandoned by Petitioner in this Court. That allegation was answered by Respondent in his informal *Response* to Gideon's petition for certiorari wherein it was pointed out that, although the Fourteenth Amendment is violated if state Prison authorities prevent a prisoner from sending out appeal documents until it is too late to take an appeal (*Cochran v. Kansas*, 316 U.S. 255), there is no such violation where a prisoner is temporarily prevented from mailing out a habeas corpus petition. There is no jurisdictional limit on the time period within which a habeas corpus application must be filed, as there is in the case of an appeal. The grounds for habeas corpus which were available to Petitioner while he was incarcerated in the Bay County Jail were available to him when he filed his petition with the Supreme Court of Florida, and any grounds which were not raised in that Court, not being *res adjudicata*, are and will be available to him for as long as he is imprisoned under his present commitment. Therefore, Petitioner could not have been permanently injured or prejudiced by the alleged conduct of the Sheriff and officials of Bay County. It should also be pointed out that, even if Petitioner had been allowed to mail his petition to the United States District Court in Tallahassee, said petition could not have been considered until State remedies had been exhausted. *White v. Ragen*, 324 U.S. 760.[6]

6. See note 4 *supra* at pp. 11-13.

QUESTIONS INVOLVED IN THE INSTANT PROCEEDING

Respondent chooses to restate the questions involved in this case as follows:

I. Under the rule of *Betts v. Brady*, 316 U.S. 455, did the Supreme Court of Florida err in denying Petitioner's application for a writ of habeas corpus?

II. Should this Court's holding in *Betts v. Brady* be reconsidered?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions reprinted in Petitioner's brief,[7] this certiorari proceeding involves the Sixth Amendment, U.S. Const.; Section 79.01, Florida Statutes; and Chapter 61-639, Laws of Florida, 1961. These provisions are reprinted in the Appendix A, *infra*.

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7. Section 1 of the Fourteenth Amendment, U. S. Const.; Fla. Const., Declaration of Rights, §11; and Sections 810.05 and 909.21, Florida Statutes. See *Brief For The Petitioner*, pp. 6, 48, and 49.

SUMMARY OF ARGUMENT

Betts v. Brady should not be overruled or modified.

I.

The allegations of Gideon's petition for habeas corpus in the Florida Supreme Court were insufficient, under existing case law developed by this Court, to entitle him to discharge from custody. Under these circumstances, the denial of the petition by the Florida Court, without requiring a return, was proper.

A charge of breaking and entering with intent to commit petit larceny is uncomplicated, and the allegation, standing alone, that Petitioner was required to defend himself on that charge is insufficient to entitle him to habeas corpus relief, under the doctrine of *Betts v. Brady*.

The trial transcript and record of proceedings in Bay County, Florida, are not incorporated in the judgment of the Florida Supreme Court and are not, therefore, subject to review in the present proceedings. However, even if we consider matters which were not before the Florida Supreme Court, such as the trial proceedings and Petitioner's personal history, it is apparent that Petitioner was competent to handle his own defense and that he received a fair trial.

II.

Historically, there is no basis for requiring the states to automatically appoint counsel in all cases. The English common law did not even provide a right to retain counsel, except in

misdemeanor and minor cases. The right to counsel provision of the Sixth Amendment, as of the time of its adoption, was intended to do way with the rules which denied representation, and was not aimed to compel the states to provide counsel for a defendant. The construction given the Sixth Amendment by this Court in *Johnson v. Zerbst*, 304 U.S. 458, was the outgrowth of a practice which had become common in the federal court system and constituted, to some extent, an exercise by this Court of its supervisory and rule-making powers over the inferior federal courts. That decision did not contemplate that automatic appointment of counsel would be required as a requisite of due process. In *Powell v. Alabama*, 287 U.S. 45, appointment of counsel was absorbed into the concept of due process to the extent that such appointment is essential to the substance of a hearing, and to that extent only.

In accordance with the requirements of our federal system of government, the states should not be required by constitutional mandate to provide counsel for indigent defendants in every case. Under the Tenth Amendment, powers not granted to the central government were reserved to the states, and those powers cannot be decreased or modified. A requirement that counsel be automatically appointed would infringe upon the historic right of the people of the states to determine their own rules of procedure and would defeat the very desirable possibility of experiment.

The "fair trial" rule as enunciated in *Powell v. Alabama* and *Betts v. Brady*, is the only test consistent with the nature and meaning of due process, since that provision is not susceptible to being reduced to a mechanical or fixed formula, and must

necessarily depend upon the circumstances of each particular situation. The right to counsel is just one aspect of the comprehending guaranty of the due process clause of a fair hearing. The Sixth Amendment, as construed in *Johnson v. Zerbst*, can be made applicable against the states through the Fourteenth Amendment only so far as the substance of a hearing would be thwarted by failure to provide counsel.

The case by case approach under the *Betts* rule is the only approach consistent with the demands of federalism and the meaning of due process. That rule provides a clear and consistent standard for determination of the right to counsel under the Fourteenth Amendment.

Although many states now provide for automatic appointment of counsel in some cases, the right so provided has not generally been accepted as a fundamental requirement. Constitutions, cases, statutes, and court rules on the subject in the states are inconsistent, and few states have construed automatic appointment provisions in cases less than capital as having constitutional or fundamental character.

To "absorb" the Sixth Amendment, as construed in *Johnson v. Zerbst*, into the due process clause of the Fourteenth Amendment, would be to impose upon the states a requirement to provide free counsel to defendants in all criminal cases, including misdemeanors. Also, since the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, the rule urged by Petitioner would require the furnishing of counsel in civil cases, in federal as well as state courts.

An automatic requirement that counsel be appointed in every case would not decrease the quantity of habeas corpus petitions being filed in federal courts. The trend in habeas corpus petitions is to allege lack of *adequate* representation, and this problem will not be solved by imposition of a rule requiring automatic appointment. A decision overruling *Betts* would engender much new litigation.

A state may not deny access to its courts on account of poverty, but should not be required to equalize social and economic conditions among its citizens. If this Court should require automatic appointment of counsel under the equal protection clause of the Fourteenth Amendment, states would logically be required to provide counsel in appeals and post conviction proceedings, and would be required to equalize economic conditions in a number of ways. This would bring on a host of problems not contemplated under the Fourteenth Amendment.

A decision reversing the present case, if retroactive, will allow over 5,000 hardened criminals in Florida to be set free. Retrials of these prisoners will be impossible in many cases. Florida and other states have followed the *Betts* rule in good faith, and to overrule that decision and impose a retroactive rule requiring appointment of counsel in all cases would endanger society.

ARGUMENT

I. THE SUPREME COURT OF FLORIDA DID NOT ERR IN DENYING GIDEON'S PETITION FOR HABEAS CORPUS.

A. Petitioner Failed To Allege Any Circumstances Which Would Entitle Him To Habeas Corpus Relief On The Ground That His Right To Counsel Was Denied.

In the case of *Powell v. Alabama*, 287 U.S. 45, this Court held that in a capital case, where the defendant is unable to employ counsel, and is incapable of adequately making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the Court whether requested or not, to assign counsel for him as a necessary requisite of due process of law.

In *Betts v. Brady*, 316 U.S. 455, this Court indicated that although a denial by a state of rights or privileges specifically embodied in the Sixth Amendment to the United States Constitution may, in certain circumstances, or in connection with other elements, operate in a given case to deprive a defendant of due process of law in violation of the Fourteenth Amendment, it cannot be said that the due process clause of the Fourteenth Amendment incorporated, as such, the specific guarantees found in the Sixth Amendment. As pointed out in that decision, due process of the Fourteenth Amendment formulates a concept less rigid and more fluid than those envisaged in other specific and particular privileges of the Bill of Rights. We quote from the decision:

"Its (The Fourteenth Amendment's) application is less a matter of rule. Asserted denial is to be tested by an ap-

praisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."[8] (Parentheses added)

In the *Betts* case, the crime was robbery and the accused was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests in that particular instance, since the issue was simply the veracity of the testimony for the State and that for the defendant. The accused was not wholly unfamiliar with criminal procedure. Under such circumstances it could not be said that his trial without a jury, resulting in a sentence of eight years, was lacking in the common and fundamental ideas of fairness and right embodied in the due process clause of the Fourteenth Amendment. The interpretation of the Fourteenth Amendment as enunciated by this Court in the *Betts* case was applied to a case involving a jury trial, in *Gallegos v. Nebraska*, 324 U.S. 55.

According to the opinion in *Bute v. Illinois*, 332 U.S. 134, an accused has a right to the assistance of counsel for his defense when there are special circumstances showing that, otherwise, the defense would not enjoy that fair notice and adequate hearing which constitute the foundation of due process of law in the trial of any criminal charge. Any doubts as to the regularity of the trial proceedings should be resolved in favor of the integrity, competence and proper performance of their

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8. 316 U.S. at 462.

official duties by the judge and the prosecutor, and if any presumption is to be indulged it should be one of regularity rather than that of irregularity. Since Bute had made no affirmative showing of exceptional circumstances such as would amount to a violation of due process under the Fourteenth Amendment, his convictions were affirmed.

In *Quicksall v. Michigan*, 339 U.S. 660, it was pointed out that, "to invalidate a plea of guilty the prisoner must establish that 'for want of benefit of counsel an ingredient of unfairness actively operated in the process that resulted in his confinement . . .'"[9]

Carter v. Illinois, 329 U.S. 173, involved a thirty year old Negro convicted of murder and sentenced to imprisonment for ninety-nine years. The trial judge did assign counsel when it came to sentencing, and petitioner alleged, on petition for certiorari, that this showed he was incapable of defending himself and entering his plea of guilty. This Court's opinion indicated that designation of counsel to assist the accused at the sentencing stage of the trial in no wise implied that the defendant was incapable of pleading guilty. The conviction was affirmed, primarily because there was nothing in the record showing what manner of man the defendant was. "Facts bearing on his maturity or capacity of comprehension, or on the circumstances under which a plea of guilty was tendered and accepted, are wholly wanting. . . ."[10] There was no showing by petitioner of circumstances creating unfairness such as would entitle him to appointment of counsel.

9. 339 U.S. at 666. The opinion cited *Foster v. Illinois*, 332 U.S. 134, and *Gibbs v. Burke*, 337 U.S. 773, as authority for this statement.

10. 329 U.S. at 178.

In *Gryger v. Burke*, 334 U.S. 728, the petitioner complained of a life sentence imposed under a Pennsylvania habitual criminal act when he was thirty-four years old. He failed to show any exceptional circumstances requiring appointment of counsel, and for that reason his conviction was upheld.

In his petition to the Florida Supreme Court, Gideon made no affirmative showing of any circumstances or unfairness which would have entitled him to counsel under the Fourteenth Amendment. He merely alleged that he was without funds and that he pleaded not guilty and requested court appointed counsel while being tried on a charge of breaking and entering with intent to commit a misdemeanor. Petitioner made no allegations concerning his age, experience, mental capacity, familiarity or unfamiliarity with court procedure, or the complexity of the legal issues presented by the charge, he made no showing of unfairness or of a lack of fundamental justice in the trial proceedings. His petition lacked any material allegations which would entitle him to counsel under the Fourteenth Amendment, and the Florida Supreme Court, in denying the petition without requiring a hearing or return, properly applied existing rules of law which have been developed by this Court.

B. Petitioner Was Not Entitled To Habeas Corpus Relief On The Mere Allegation That He was Refused Court-Appointed Counsel At Trial For Breaking And Entering With Intent To Commit Petit Larceny.

A charge of breaking and entering with intent to commit petit larceny in Florida is uncomplicated, and Petitioner's mere allegation, standing alone, that he was refused counsel by the trial court and thereby required to defend himself on that

charge, did not entitle him to habeas corpus relief in the Florida Supreme Court.

Foster v. Illinois, 332 U.S. 134, involved two petitioners who had been thirty-four and forty-eight years of age at the time they had entered pleas of guilty to charges of burglary and larceny. The convictions were affirmed because there was "neither proof nor uncontradicted allegation of any . . . miscarriage of justice in accepting pleas of guilty . . ." Although in that case the petitioners had pleaded guilty, Mr. Justice Frankfurter, speaking for the Court, pointed out that where exceptional circumstances exist which would require that a defendant be appointed counsel under the rule set forth in *Betts v. Brady*, *supra*, and *Palko v. Connecticut*, 302 U.S. 319, 327, the need for such appointment "may exist whether an accused contests a charge against him or pleads guilty."[11] Inherent in the Court's holding in *Foster v. Illinois* is the principle that a charge of burglary or larceny, in and of itself, is not so complex as to require appointment of counsel as an essential of Due Process, and this principle is applicable regardless whether the defendant pleads guilty or contests the charge.

In Florida, to constitute the crime of breaking and entering or entering without breaking, with intent to commit a misdemeanor, the accused must have intended to commit that misdemeanor in the building. *McNair v. State*, 61 Fla. 35, 55 So. 401. The building must, of course, belong to someone else. *Cannon v. State*, 102 Fla. 928, 136 So. 695; *Vicente v. State*, 66 Fla. 197, 63 So. 423. The gist of the offense is the intent entertained by the wrongdoer at the time of the breaking or entering. *Vawter v. State*, 63 So. 2d 255. The offense with

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11 332 U.S. at 138.

12 *Id.* at 137. See also *Uveges v. Pennsylvania*, 335 U.S. 437, 441.

which Petitioner was charged consists of three simple elements: (1) a breaking or entering (2) the building of another (3) with intent to commit petit larceny.[13]

C. The Trial Record And Transcript Are Not Incorporated In The Judgment Of The Florida Supreme Court And Therefore Are Not Subject To Review By This Court.

Section 79.01, Florida Statutes,[14] requires that, before a writ of habeas corpus shall issue, the petitioner shall show "probable cause to believe that he is detained in custody without lawful authority." The writ of habeas corpus does not issue as of course in every instance. Reasonable grounds or justiciable issues must be shown to exist before the writ will be awarded, and, where a petition does not make a prima facie showing that the applicant is entitled to be discharged from custody, the writ should be denied when applied for in the first instance. *Skipper v. Schumacher*, 118 Fla. 867, 160 So. 357; *ex parte Aulday*, 113 Fla. 70, 151 So. 388; *Sullivan v. State ex rel McCrory*, 49 So. 2d 794; *State ex rel Davis v. Hardie*, 108 Fla. 133, 437, 146 So. 97.[15] For purposes of determining whether the petitioner has made such prima facie showing, the allegations of the petition must, of course, be accepted as true. *Cash v. Culver*, 358 U.S. 633.[16] The practice of the Florida Supreme

13. In Florida the crime of petit larceny is the stealing of property having a value of less than $100.00. Section 811.021, Florida Statutes.
14. See Appendix, *infra*.
15. See also *Sneed v. Mayo*, 60 So. 2d 865, 69 So. 2d 653.
16. In the *Cash* case, it was pointed out that allegations of circumstance which would entitle petitioner to relief, if true, made it incumbent upon the Florida courts, in that instance, to determine what the true facts were. After reversal by this Court, the Florida Supreme Court determined that Cash's

Court is to deny the petition if its allegations are insufficient but to issue a writ and require a return if a prima facie showing is made that petitioner is being illegally held. If, after return, there is a dispute of fact, that Court will order a hearing before a commissioner. In the instant case the bare allegations of petitioner, without any showing of circumstances which operated to deny him a fair hearing, were insufficient to entitle him to issuance of a writ of habeas corpus[17] and the order of denial issued by the Florida Supreme Court was proper.

Under 28 U.S.C. §1257, upon which jurisdiction is invoked in the present case, this Court may, by certiorari, review certain *judgments or decrees* rendered by the highest court of a state. A judgment is a decision of a court based upon matters which are before it for determination. As already pointed out, the Florida Supreme Court was under no duty, under existing law, to issue a writ and require a return or a hearing in the present case. In the absence of such duty or obligation, it is apparent that matters which were not alleged or incorporated in the petition are not and cannot be considered to be included in the judgment now being reviewed. In *Hedgebeth v. North Carolina*, 334 U.S. 806, 807, in a *per curiam* opinion this Court noted that "In reviewing a judgment of a State court, we are bound by the record on which that judgment was based." From *Carter v. Illinois*, *supra*, page 176, we quote as follows:

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representations as to need for court-appointed counsel were unfounded but that he had been deprived of a reasonable opportunity to obtain counsel of his own choice. *Cash v. Culver*, 120 So. 2d 590; 122 So. 2d 179.

17. *Betts v. Brady*, *Carter v. Illinois*, *Gryger v. Burke*, *Quicksall v. Michigan*, *Bute v. Illinois*, *supra*.

"When a defendant, as here, invokes a remedy provided by the State of Illinois, the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding . . . ."

It is Respondent's position that, although the Bay County trial court record and transcript of proceedings have been incorporated in the printed record before this Court, they do not form a part of the judgment subject to review and should not constitute a predicate for this Court's decision herein.

D. The Trial Record And Proceedings And Petitioner's Personal History Show That He Received A Fair Trial.

Even if we assume that this Court has the power, on this review, to supplement the judgment of the Court below with transcripts and other matters which were not before the Florida Supreme Court, it is obvious from an examination of the trial record and proceedings and the personal history of Petitioner that he received a fair trial in the Circuit Court of Bay County, Florida. Although the trial proceedings[18] do not contain information bearing on Petitioner's age, education, work experience, etc., it should be pointed out that Petitioner is a white male and that he was fifty years old at the time of the crime herein involved. His prison record reflects that he completed the eighth grade. He lists his occupation as being that of a mechanic, but his prison classification summary also shows that he has worked as a short order cook and an auto electrician and that he worked at a shoe factory while previously in prison.

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18. R. 1-44.

Petitioner's record indicates that [illegible] unfamiliar with criminal procedure.[19]

The identity of the man who was seen in the Bay Haven Poolroom appears to have been the only issue involved in the trial below. Petitioner attempted to show that the eye witness for the State, Henry Cook (R. 19-24), may have been mistaken in his identification of Petitioner as the man he saw by the cigarette machine in the Poolroom, from which money had been taken (R. 13, 20, 30, 39). It was his theory that Cook had seen someone else in the Poolroom and had then mistakenly thought that Petitioner, who claimed to have been in a phone booth at the time, was the man who had come out the back door of the Poolroom after the crime. This possibility, however, was effectively negated by the testimony of Henry Cook and Mrs. Rhodes (R. 17, 18, 30, 31).

The trial transcript shows that the trial judge conducted a fair and impartial trial. For example, the court interrogated the venire (R. 10), explained his rights to Petitioner at various stages of the trial (R. 3, 10, 11, 41), and charged the jury with a complete and fair set of instructions (R. 42-44).

Petitioner took an active role in his defense and showed that he possessed much skill and facility in questioning witnesses and handling himself in court. He made an opening statement (R. 11), examined ten witnesses, and made an eleven-minute closing argument to the jury (R. 41).

Counsel for Petitioner has attempted to show that Gideon

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19 *Betts v. Brady*, *supra*, at 472.

did not receive a fair trial. He cites *McNair v. State*, 61 Fla. 35, 55 So. 401, as authority for the notion that "the offense of breaking and entering with intent to commit a misdemeanor raises a number of subtle and complex questions."[20] That case states that intent is the gist of the offense and that it is not necessarily implied from the simple fact of entering a building. The case also points out that whether the defendant had the necessary intent is a question of fact to be decided from all the circumstances of the case. In the instant case, breaking was proven to the satisfaction of the jury as was the theft of money and wine by Petitioner. Proof of these facts is strong evidence that Petitioner possessed the requisite intent when he broke into the Bay Harbor Poolroom.

Petitioner complains that the trial judge did not explain the elements of the offense to the jury.[21] We would like to point out that the trial court defined the crime charged with as much particularity as can be required considering the simplicity of the crime of breaking and entering with intent to commit petit larceny.

Petitioner intimates that he may have had a good defense (intoxication) which he was unable to present due to lack of counsel, and that the Court failed to instruct the jury with regard to such defense.[22] He cites *Jenkins v. State*, 58 Fla. 62, 50 So. 582, to illustrate his position. That case holds that a verdict of guilty for breaking and entering with intent to commit petit larceny will not be set aside upon the ground of

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20. *Briefs For The Petitioner*, p. 49.
21. *Ibid.*
22. *Id.* at 49, 50.

intoxication where the evidence fails to show that the defendant was intoxicated at the time that he entered the building to such an extent that he was unable to form a criminal intent. In *Miller v. State*, 76 Fla. 518, 80 So. 314, no evidence was adduced to show that the defendants were not in the full possession of their faculties at the time of the commission of the crime. The Florida Supreme Court indicated that in the absence of such evidence an instruction as to intoxication was properly refused. In the present case, the evidence showed that Petitioner was not intoxicated during the commission of the crime (R. 26, 27, 40). *Adkinson v. State*, 48 Fla. 1, 37 So. 522, cited by Petitioner,[23] to show that the trial judge improperly limited cross examination must be limited to the facts of that case.

Counsel for Petitioner makes capital of the fact that Petitioner was given a sentence of five years, the maximum prison term authorized for the crime for which he was convicted,[24] even though he committed a relatively minor offense. In all fairness to the trial judge, it must be noted that at the time of sentencing, Petitioner had already been convicted of four felonies, three of which involved burglary in some form. This factor undoubtedly had some bearing on the sentence given Petitioner in the present case.

When Petitioner first appeared for arraignment he "requested permission to consult counsel" and arraignment was postponed for one month (R. 2). At his arraignment he was "questioned by the Court concerning his understanding of the charge filed against him and of his rights under the law" (R.3). Although no

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23. *Id.* at 50.
24. *Id* at 3, 50.

transcript of these pre-trial proceedings is available, it appears that Petitioner may not have been indigent at that time, that he may have consulted counsel prior to trial and that he may have waived his right to counsel prior to the day of trial.

From the trial record and transcript, as supplemented by Petitioner's personal history, it is obvious that he was competent and that he received a fair trial.

II. THIS COURT'S HOLDING IN *BETTS V. BRADY* SHOULD NOT BE OVERRULED OR MODIFIED.

A. Historically, There Is No Basis For Requiring States To Automatically Appoint Counsel In All Cases.

At common law in England a prisoner was not entitled to defend by counsel upon the general issue of not guilty on any indictment for treason or felony,[25] but in misdemeanor cases English law had recognized the accused's right to retain counsel.[26] In some instances, persons charged with felony were allowed counsel with respect to legal questions which the accused himself might suggest,[27] but it was not until 1836 that the right to retain counsel, in England, was extended to all criminal proceedings.[28]

The Constitutions of the thirteen original states as of the time the Bill of Rights was ratified, in 1791, reflect that Maryland, Massachusetts, New York, Pennsylvania, New Hampshire,

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25. *Betts v. Brady*, *supra*, at 466.
26. Beaney, *The Right to Counsel in American Courts*, p. 8 (1955).
27. *Powell v. Alabama*, *supra*, at 60.
28. See note 26 *supra*.

Delaware and New Jersey had constitutional provisions providing for the right to counsel in one form or another. The Massachusetts provision was adopted in 1790, after Congress had approved the Bill of Rights in 1789 but before those amendments had been fully ratified by the states.[29] The statutes in force in the thirteen original states in 1789-91 exhibit great diversity of policy. Pennsylvania, South Carolina and Delaware provided for appointment of counsel in capital cases prior to 1789, and New Hampshire passed such a law in February, 1791, prior to complete ratification of the Sixth Amendment. An act passed by Massachusetts in 1777 gave the right to have counsel appointed in cases of treason or misprision of treason. Connecticut had no statute on the subject but it may have been the custom of the courts in that State to assign counsel in all criminal cases. North Carolina made no provision for appointment but accorded defendants the right to have counsel.[30]

According to the above information regarding the laws and practices of the courts of the thirteen original states at the time that the Bill of Rights became part of the Constitution, it appears that the courts of only one state made any provision for assignment of counsel in cases less than capital; and the courts of that state did so only by custom and practice and not by statutory or constitutional mandate. In view of these facts, it must be concluded that the right to counsel provision of the Sixth Amendment did not, at the time of its adoption and ratification, embrace the right to have counsel appointed. It only included the right to retain counsel. In light of the common law practice, it has been said that the right to counsel

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29. See note 25 *supra* at 465.
30. *Id.* at 467, fn. 20; See note 27 *supra* at 62, fn. 1.

provision of the Sixth Amendment was intended to do away with the rules which denied representation but was not aimed to compel the state to provide counsel for a defendant.[31]

The above conclusion is substantiated by Story, who commented on the right to counsel as being a right to *employ* counsel.[32] Several months before the ratification of the Bill of Rights, Congress furnished an illuminating clue concerning the original meaning of the counsel provision of the Sixth Amendment when it passed a law requiring that every person indicted for treason or other capital crime in the federal courts shall be entitled to assignment of counsel.[33] If the proposed Sixth Amendment counsel provision included a guaranty of appointed counsel in all cases, Congress obviously would not have passed this halfway measure.[34]

In the case of *United States v. Van Duzee*, 140 U.S. 169, decided in 1890, this Court stated that:

"There is . . . no general obligation on the part of the government either to furnish copies of indictments, summon

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31. See note 25 *supra*.
32. *Story on the Constitution*, 5th Ed., §1794, p. 574.
33. 1 United States Statutes at Large, ch. 9, p. 118 (1790). That statute, in pertinent part, reads as follows:
"... every person so accused and indicted for any of the crimes aforesaid, (treason, other capital offenses) shall also be allowed and admitted to make his full defense by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two as such person shall desire, ..." (parentheses added).
34. See note 26 *supra* at 28.

witnesses or retain counsel for defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them, but it was not contemplated that this should be done at the expense of the government . . . ."

All courts have the inherent power to appoint counsel where that course seems to be required in the interest of fairness, and, though the Sixth Amendment did not originally require assignment of counsel to defend indigent defendants, it nevertheless became an almost universal practice, between 1789 and 1938, for the federal courts to assign counsel to unrepresented indigent defendants in all serious criminal cases.

In 1931, the Wickersham Commission, in outlining the essential characteristics of American criminal proceedings, concluded that the right guaranteed by the Sixth Amendment and similar state provisions was, historically, that of employing counsel.[35]

In *Johnson v. Zerbst*, 304 U.S. 458, this Court construed the Sixth Amendment as requiring automatic appointment of counsel in all federal criminal cases. The decision was an outgrowth of the practice which had developed in the federal court system. It is apparent, from the opinion of this Court in *Johnson v. Zerbst* and from the circumstances under which it was rendered, that the holding of that case was not predicated on history nor was it based on the premise that automatic appointment in all criminal cases is a requisite of due process of law under the Fifth or Fourteenth Amendments. The construction given the

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35. *U.S. National Committee On Law Observance and Enforcement, Report on Prosecution*, p. 30 (1931).

Sixth Amendment counsel provision in *Johnson v. Zerbst* constituted, to some extent, an exercise by this Court of its supervisory and rule-making power over federal criminal procedure. For discussions concerning this supervisory power, see *McNabb v. United States*, 318 U.S. 332, 340; *United States v. Rabinowitz*, 339 U.S. 56, 57, (Justice Black, dissenting); *Holland v. United States*, 348 U.S. 121, 135 (footnote 7); *Hoag v. New Jersey*, 356 U.S. 464, 471; *Marshall v. United States*, 360 U.S. 310, 313; *Rosenberg v. United States*, 346 U.S. 271, 287; *Gallegos v. Nebraska*, supra, at 64; *Watts v. Indiana*, 338 U.S. 49, 50, footnote 1); and *Mookini v. United States*, 303 U.S. 201, 206. This rule-making or supervisory power does not exist with respect to criminal procedure in state courts. We quote from the *McNabb* case, *supra*:

> "... while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction."

The radical change brought about by the *Johnson v. Zerbst*

opinion with respect to the common understanding of the meaning of the Sixth Amendment is illustrated by Judge Sibley's opinions in *Saylor v. Sanford*, 99 F. 2d 605, and *Sanford v. Robbins*, 115 F. 2d 435, written shortly after the *Johnson* decision. We quote from *Saylor v. Sanford*, supra, at page 607:

> "... The Constitution in saying that 'the accused shall enjoy the right *** to have the Assistance of counsel for his defense' means that if he provides himself counsel the court shall allow the counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel....
>
> There are proposals pending before the Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provisions and have never been supposed to be:..."

Sanford v. Robbins holds that the due process clause of the Fifth Amendment does not require federal courts to furnish counsel. In *Gall v. Brady*, 39 F. Supp. 504, the Court said that *Johnson v. Zerbst* had placed a construction on the Sixth Amendment which was broader than that theretofore commonly understood in the light of the history of Anglo-Saxon criminal procedure.

The test of what is due process depends, to some extent, upon the meaning and content of that term at common law and in the colonies or states prior to the adoption of the Bill of Rights. The right to be heard by counsel employed by the

defendant may well be included in that guaranty, but by any historical test that might be applied, automatic appointment of counsel in all criminal cases has never been considered an essential of due process.

In *Powell v. Alabama*, *supra*, this Court held that counsel must be appointed under the due process clause of the Fourteenth Amendment in capital cases where the defendant is ignorant, illiterate, or otherwise unable to present his own defense. The Court pointed out that the right to have counsel appointed, "when necessary" is a "logical corollary from the constitutional right to be heard by counsel."[36] The decision turned upon the fact that in the particular situation before the court, the benefit of counsel was essential to the substance of a hearing. To the extent that appointment of counsel is necessary to the substance of a hearing, and to that extent only, that "corollary from the constitutional right to be heard by counsel" has been included in the concept of due process under the Fourteenth Amendment and made applicable as against the states.

The following conclusions can be drawn from the above discussion:

1. The English common law provided the right to *retain* counsel in misdemeanors but no right to counsel in felony cases.

2. The Sixth Amendment as originally intended guaranteed the right to retain counsel, not the right to have counsel appointed in cases of indigency.

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36. 287 U.S. at 72.

3. The construction given the Sixth Amendment by this Court in *Johnson v. Zerbst* was the outgrowth of a practice which had become common in the federal court system.

4. The decision in *Johnson v. Zerbst* to some extent constituted an exercise by this Court of its supervisory and rule-making powers over the inferior federal courts.

5. This court's opinion in *Johnson v. Zerbst* did not contemplate that automatic appointment of counsel could be required as a requisite of due process of law.

6. Appointment of counsel has been included in the concept of due process to the extent that such appointment is essential to the substance of a hearing, and to that extent only.

B. Under Our Federal System, the States Should Not Be Required By Constitutional Mandate To Provide Counsel For Indigent Defendants In Every Case.

Shortly after the adoption of the Fourteenth Amendment, it was argued in the *Slaughterhouse Cases*, 16 Wall 36; 21 L. ed 394, that the privileges or immunities of the citizens of the United States which were not to be abridged by any state were the privileges which citizens theretofore had enjoyed under the Constitution. However, "after the fullest consideration that view was rejected," and the rejection has the authority that comes from contemporaneous knowledge of the purpose of the Fourteenth Amendment."[37] The majority opinion of Mr. Justice Miller in the *Slaughterhouse Cases* was reaffirmed in *Twining*

37. See concurring opinion of Mr. Justice Frankfurter in *Louisiana v. Resweber*, 329 U.S. 459, 467.

v. New Jersey, 211 U.S. 78, in which this Court held that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by the Fourteenth Amendment against abridgment by the states. (See also *Adamson v. California*, 332 U.S. 46). In *Palko v. Connecticut*, *supra*, it was held that immunity from secondary jeopardy is not a privilege or immunity of the citizens of the United States.

From time to time it has been asserted before this Court that the first eight amendments of the Constitution should be "incorporated," so to speak, in the Fourteenth Amendment as limitations upon the power of the states, even though the Bill of Rights was originally intended as a restriction upon the power of the federal government. It has been consistently held, however, that the criminal procedure provisions of the first eight amendments apply only to the procedure and trial of cases in federal courts. *Gaines v. Washington*, 227 U.S. 81; *Spies v. Illinois*, 123 U.S. 131; *Re Sawyer*, 124 U.S. 200; *Brooks v. Missouri*, 124 U.S. 394; *Eilenbecker v. District Court*, 134 U.S. 31; *West v. Louisiana*, 194 U.S. 258; *Howard v. Kentucky*, 200 U.S. 164. The Fourteenth Amendment does not constitute a "shorthand summary" of the Bill of Rights;[38] and the specific procedural guarantees of the first eight amendments are not included in the meaning of due process. A prosecution for a capital case by information instead of indictment is not necessarily a violation of due process. *Hurtado v. California*, 110 U.S. 516; *Gaines v. Washington*, *supra*; *Hodgson v. Vermont*,

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38. See concurring opinion of Mr. Justice Frankfurter in *Adamson v. California*, *supra*, at 59, and dissenting opinion of Mr. Justice Stone in *Colgate v. Harvey*, 296 U.S. 404, 445.

168 U.S. 262; *Powell v. United States*, 221 U.S. 325, *Bohm v. Nebraska*, 176 U.S. 83, *McNulty v. California*, 149 U.S. 645; *Maxwell v. Dow*, 176 U.S. 581. The provision of the Bill of Rights which secures to every party, where the value in controversy exceeds $20, the right of trial by jury, does not apply to trials in the state courts. *Edwards v. Elliott*, 21 Wall 532; 22 L. ed 487. There is nothing in the Fourteenth Amendment that requires a jury trial for any offender. *Tumey v. Ohio*, 273 U.S. 510; *Maxwell v. Dow*, *supra*; *Hallinger v. Davis*, 146 U.S. 314; *Walker v. Sauvinet*, 92 U.S. 90; *Brown v. New Jersey*, 175 U.S. 172. The Federal Constitution does not require, under all circumstances, that the defendant in a state court should be confronted with witnesses against him. *West v. Louisiana*, *supra*. The Fifth Amendment privilege against self-incrimination is not applicable to the states. *Twining v. New Jersey*, *supra*; *Adamson v. California*, *supra*; *Palko v. Connecticut*, *supra*; *Cohen v. Hurley*, 366 U.S. 117.

The Fourteenth Amendment does not impose upon the states any uniform code of criminal procedure. The power of a legislature of a state to prescribe the number of peremptory challenges in criminal cases is limited only by the necessity of having an impartial jury. *Hayes v. Missouri*, 120 U.S. 68. A state is free to provide for differences in treatment of habitual criminals. *Graham v. West Virginia*, 224 U.S. 616. A state is free to allocate functions as between judge and jury as it sees fit. *Stein v. New York*, 346 U.S. 156, 179. So far as the Fourteenth Amendment is concerned, the presence of a defendant at a trial is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. *Snyder v. Massachusetts*, 291 U.S. 97.

In *Missouri v. Lewis*, 101 U.S. 22, Mr. Justice Bradley said, in effect, that the Fourteenth Amendment would not prevent a state from adopting or continuing the Civil Law instead of the common law. He pointed out that the Fourteenth Amendment does not secure to all persons in the United States the benefit of the same laws. Each state may prescribe its own mode of judicial proceedings, and "great diversities . . . may exist in two states separated only by an imaginary line." A state may even provide for different systems of judicature in the various geographical areas within its borders.

In *Twining v. New Jersey*, *supra*, at 106, the Court commented that in our dual form of government nothing is more fundamental than the power of the state to order its own affairs and govern its own people except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power.

This Court declared, in *Maxwell v. Dow*, 176 U.S. 581, 593, that the Fourteenth Amendment did not radically change the whole theory of the relations of the State and Federal governments to each other. At page 605 of the opinion this statement was made:

> "... the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials . . . ."

Mr. Justice Cardozo, in *Snyder v. Massachusetts*, supra, at 122, said:

> "The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice. . . ."

See also *Cassell v. Texas*, 339 U.S. 282; *Carter v. Illinois*, *supra*; *Buchalter v. New York*, 319 U.S. 427; *Tumey v. Ohio*, *supra*; *Jordan v. Massachusetts*, 225 U.S. 167; *Holmes v. Conway*, 241 U.S. 625; *Hoag v. New Jersey*, *supra* at 468; *Cicenia v. La Gay*, 357 U.S. 504; *Knapp v. Schweitzer*, 357 U.S. 371, 375, 376.

The states are not tied down by any provisions of the Federal Constitution to the practice and procedure which existed at common law, and they may take advantage of experience to make such changes as may be necessary. *Brown v. New Jersey*, *supra*.

Mr. Justice Frankfurter has noted that "the Fourteenth Amendment did not mean to imprison the states into the limited experience of the eighteenth century,"[39] and Justice Holmes said, in his dissent in *Truax v. Corrigan*, 257 U.S. 312, 344:

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion

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39. See note 37 supra at 468.

> of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

In a right to counsel case it has been said that "due process, 'itself a historical product' . . . is not to be turned into a destructive dogma in the administration of systems of criminal justice under which the states have lived not only before the Fourteenth Amendment but for the eighty years since its adoption." *Foster v. Illinois*, *supra* at 139. From *Bute v. Illinois*, *supra* at 668, we quote as follows:

> "If in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner (rule requiring automatic appointment of counsel in all felony cases) and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures . . . but it would introduce extraordinary confusion and uncertainty into local criminal procedure . . . ." (parenthesis added).

Under the Tenth Amendment of the Constitution, all powers not granted to the central government were specifically reserved to the states. These reserved powers, including the power of the states to control proceedings in their own courts, cannot be diminished or modified. While this Court has the power and authority to supervise the administration of criminal justice in the federal courts, it has no such power with respect to state court proceedings, except where a state has denied an individual the essentials of justice under the Fourteenth Amendment.

Where a defendant receives an unfair trial in a state court and the unfairness is not remedied by the state, it is proper that this court should have jurisdiction to reverse so that he might be accorded the fundamentals of justice. However, where a defendant is fairly tried by state courts, it is not proper, under our federal system, for the federal government or its courts to intervene.

Even if we assume, *arguendo*, that failure of a court to appoint counsel in a non-capital case under present procedural rules, is, *per se*, a denial of fundamental justice, it must be conceded that there is always the possibility that model rules of criminal procedure can be devised which would afford fair trials even to those who are unable to procure the assistance of counsel. For instance, a state may simplify its court procedure to such extent as to equalize any differences in the respective abilities of the prosecutor and the average defendant, or it may even find a way to dispense with the need for prosecuting attorneys in some cases. Rules might be devised which would make it impossible for a defendant, represented or unrepresented, to waive any defenses which he might have.

But, if this Court reverses the *Betts* case and declares an inflexible rule requiring automatic appointment in every case, states would be prevented from adopting novel forms of procedure, whether *fair or unfair*. By adopting a rule which would preclude a state from adopting a fair, just code of procedure, this Court would be infringing upon the historic powers of the states. Such a decision would defeat the very desirable possibility of state experiment in the field of criminal procedure.

C. The "Fair Trial" Test As Enunciated In *Powell v. Ala-*

bama, and *Betts v. Brady* Is Consistent With The Nature And Meaning Of Due Process.

As we have already indicated, the provisions of the first eight amendments to the United States Constitution do not constitute specific limitations upon the power of the states. Provisions of these first eight amendments may, however, restrict the activity of a state in extreme instances, in which case the Fourteenth Amendment makes them applicable to a particular factual situation.

The Fourteenth Amendment is a broad, inexplicit provision, and it is not susceptible of being reduced to a mechanical or fixed formula. Speaking of the Fourteenth Amendment, in his concurring opinion in *Adamson v. California*, *supra*, at 66, Mr. Justice Frankfurter said:

> "The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them."

As to the meaning of the due process clause of the Fourteenth Amendment, with respect to court procedure, that guaranty appears to require that no man shall be condemned without due notice and an opportunity of being heard in his defense. *Holden v. Mangum*, 237 U.S. 309; *Rogers v. Peck*, 199 U.S. 425; *Howard v. Kentucky*, 200 U.S. 164; *Garland v. Washington*, 232 U.S. 642; *Simon v. Craft*, 182 U.S. 427; *Missouri ex rel Hurwitz v. North*, 271 U.S. 40; and *Louisville and N.R. Co. v. Schmidt*, 177 U.S. 230.

In *Holden v. Hardy*, 169 U.S. 366, at 389, 390, due process was defined as follows:

"It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

In *Hebert v. Louisiana*, 272 U.S. 312, 316, this Court declared that the due process of law clause of the Fourteenth Amendment requires that state action "shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."

In *Snyder v. Massachusetts*, supra, at p. 114, Mr. Justice Cardozo referred to the "vague precepts" of the Fourteenth Amendment. He said in that case that:

"Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' . . . What is fair in one set of circumstances may be an act of tyranny in others."[40]

Lisenba v. California, 314 U.S. 219, 236, contained the following rule for ascertaining what is meant by due process:

". . . as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally

40. 291 U.S. at 116, 117.

infected the trial, the acts complained of must be such quality as necessarily prevent a fair trial."

In Mr. Justice Frankfurter's concurring opinion in *Adamson v. California*, *supra*, at 67, 68, it was pointed out that judicial review of the due process clause of the Fourteenth Amendment "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples . . . . These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia . . . ."

Due process of law depends on circumstances. "It varies with the subject matter and the necessities of the situation." (Mr. Justice Holmes, in *Moyer v. Peabody*, 212 U.S. 78, 84). "The pattern of due process is picked out in the facts and circumstances of each case." *Brock v. North Carolina*, 344 U.S. 424; *Hoag v. New Jersey*, *supra*.

Other cases which discuss the necessity for an appraisal of the facts of each case in determining whether deprivation of counsel works a fundamental unfairness are *Gibbs v. Burke*, 337 U.S. 773, 780 and *Foster v. Illinois*, *supra*.

In *Palko v. Connecticut*, *supra*, at 325, this Court summarized the previous cases which had contained discussions on the meaning of due process and stated that immunities contained in the specific amendments may be included in the concept of due process if "found to be implicit in the concept of ordered liberty." Also, principles of justice "so rooted in the traditions

and conscience of our people as to be ranked as fundamental" may be considered a part of due process of the Fourteenth Amendment.

In *Palko* the opinion of this Court indicated that the right to counsel provision of the Sixth Amendment had been found to be implicit in the concept of ordered liberty, in *Powell v. Alabama*, supra. However, "the decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing."[41] The *Palko* case indicates that the right to counsel provision of the Sixth Amendment can be made applicable against the states through the Fourteenth Amendment only so far as the substance of a hearing would be thwarted by failure to provide counsel. What will be sufficient to constitute a fair hearing must naturally depend to some extent upon the circumstances of the particular case. *Gall v. Brady*, 39 F. Supp. 504.

It is now established that, in the administration of criminal justice, a state's duty to provide counsel is but one aspect of the comprehending guaranty of the due process clause of a fair hearing on an accusation, including adequate opportunity to meet it. *Quicksall v. Michigan*, supra; *Townsend v. Burke*, 334 U.S. 736; *Foster v. Illinois*, *supra*; *Carter v. Illinois*; and *Cicenia v. La Gay*, *supra*.

In other aspects of criminal procedure as well as in the right

41. 302 U.S. at 327.

to counsel area there is no "ready litmus-paper test" or fixed formula for determining what is due process. *U.S. v. Rabinowitz*, 339 U.S. 56; *Lynos v. Oklahoma*, 322 U.S. 596.

In conclusion, it may be said that due process cannot be reduced to a mechanical formula in cases relating to any area of criminal procedure. In right to counsel cases the appointment of counsel is an element of due process only to the extent that a fair and just hearing would be prevented by the failure to appoint counsel and to that extent only. Also, the right to counsel is just one aspect to be considered in determining, in a given case, whether there has been a denial of due process. While the federal courts are subject to strict, rigid, requirements of the first eight amendments, the states are restricted only by the broad definitions of due process set forth in *Holden v. Hardy*, *Hebert v. Louisiana*, and *Palko v. Connecticut*. The "fair trial" test set out in *Powell v. Alabama* and *Betts v. Brady* is a natural and imperative result of the principles which have been developed by this Court in *Palko* and similar cases. In applying the "fair trial" test we must look to the circumstances of each case.

D. The *Betts v. Brady* Rule, As Developed By This Court, Provides a Clear And Consistent Standard For Determination Of The Right To Counsel Under The Fourteenth Amendment.

From the cases that have been decided under the *Betts v. Brady* rule during the last twenty years, this Court has proclaimed the following factors or circumstances as guides for determining whether a defendant, in a particular situation, has been denied the aid of court-appointed counsel:

1. Gravity of the offense, i.e., whether capital or non-capital.[42]
2. Complexity of the charge against the defendant.[43]
3. Ignorance[44]
4. Illiteracy or lack of education[45]
5. Extreme youth or lack of experience[46]
6. Familiarity with court procedure[47]
7. Feeble-mindedness or insanity[48]
8. Inability to understand the English language[49]
9. Prejudicial conduct shown by trial judge, prosecuting attorney or public defender[50]
10. Plea of guilty by co-defendant within hearing of jury[51]

To illustrate his position that the *Betts* rule does not provide a workable standard, counsel for Petitioner has, on pages 37 and 38 of his brief, compared three sets of cases. None of the comparisons, however, prove his thesis. For instance, he points out that this Court reversed the conviction of a seventeen year old

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42. *Williams v. Kaiser*, 323 U.S. 471; *Tomkins v. Missouri*, 323 U.S. 485; *Hamilton v. Alabama*, 368 U.S. 52.
43. *Rice v. Olson*, 324 U.S. 786; *DeMeerleer v. Michigan*, 329 U.S. 663; *McNeal v. Culver*, 365 U.S. 109; *Chewning v. Cunningham*, 368 U.S. 443; *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116.
44. *Smith v. O'Grady*, 312 U.S. 329; *Tomkins v. Missouri*, *supra* note 42.
45. *Carnley v. Cochran*, 369 U.S. 506; *Cash v. Culver*, 358 U.S. 633.
46. *Wade v. Mayo*, 334 U.S. 672; *Uveges v. Pennsylvania*, 335 U.S. 437; *Moore v. Michigan*, 355 U.S. 155.
47. *Wade v. Mayo*, supra note 46; *McNeal v. Culver*, *supra* note 43.
48. *Palmer v. Ashe*, 342 U.S. 134; *Massey v. Moore*, 348 U.S. 105.
49. *Marino v. Ragen*, 332 U.S. 561.
50. *White v. Ragen*, 324 U.S. 760; *Townsend v. Burke*, 334 U.S. 736; *Hawk v. Olson*, 326 U.S. 271; *Reynolds v. Cochran*, 365 U.S. 525; *Gibbs v. Burke*, 337 U.S. 773.
51. *Hudson v. North Carolina*, 363 U.S. 697.

youth, in *DeMeerleer v. Michigan*, 329 U.S. 663, while upholding the conviction of a sixteen year old defendant in *Gayes v. New York*, 332 U.S. 145. DeMeerleer was confronted by a complex first-degree murder charge and was arraigned, tried, convicted and sentenced on the same day. The record showed that he had never been advised of his right to counsel, and indicated that considerable confusion existed in his mind at the time of arraignment as to the effect of a plea of guilty. No evidence was introduced on his behalf, and no witnesses were cross examined. Gayes, at the age of sixteen, was charged with burglary in the third degree and petit larceny. He said he didn't want counsel and pleaded guilty. At the age of 19 he pleaded guilty to a charge of being a second offender. After having served the first sentence, he sought relief from the second offender sentence, but this Court pointed out that he could not "by a flank attack"[52] challenge the first sentence.

In his second comparison, Petitioner has attempted to find inconsistency between *Quicksall v. Michigan*, 339 U.S. 660, and *Carnley v. Cochran*, 369 U.S. 506. He states that in *Quicksall* "the Court felt it reasonable to presume from the accused's prior appearances in court that he knew of his right to counsel, and since he made no request for legal aid, his rights were not infringed," but that in *Carnley* "the Court felt that a prior criminal record magnified the importance of the assistance of counsel because of its implications in the event the accused takes the witness stand."[53] In *Quicksall* the defendant pleaded guilty and, of course, there was no danger of his taking the witness stand. It should also be noted that, prior to the time

52. 332 U.S. at 149.
53. *Supra* note 20 at 37 and 38.

that the *Quicksall* case reached this Court, the Michigan courts had meticulously made findings of fact which conclusively showed that the Petitioner's plea of guilty was freely, voluntarily and understandingly made.

Petitioner states that it is difficult to reconcile *Gryger v. Burke*, 334 U.S. 728, with *Townsend v. Burke*, 334 U.S. 736, saying that in *Gryger* the defendant "argued that the state court mistakenly assumed that the applicable statute made (his sentence) mandatory", while in *Townsend*, "the defendant contended that the court imposed a sentence under the erroneous impression that defendant's record included convictions on two charges as to which, in fact, he had been acquitted."[54] (parenthesis ours). A reading of the *Townsend* case makes clear that the reversal of petitioner's sentence there was due to the foul play, carelessness, and facetiousness on the part of the trial court. This Court's ruling in *Gryger* was due to the fact that petitioner's allegation involved a question of Pennsylvania law which this Court was not empowered to decide. Also, there was nothing in the record to impeach "the fairness and temperateness with which the trial judge approached his task."[55]

If it can be said that *Betts* and the cases which have followed are inconsistent and that they do not comprise a workable standard, it can be argued with equal force that the entire common law is inconsistent and that it, likewise, should be rejected. The *Betts* approach is the common law approach, consisting of the development of a body of law on a case by case basis, and lawyers for centuries have thrived on distin-

54. *Id.* at 38.
55. 334 U.S. at 731.

gushing one case from another on the basis of factual situations and circumstances.

Petitioner argues that the distinction existing in the *Powell v. Alabama—Betts v. Brady* rule between capital and non-capital offenses does not furnish a valid basis for deciding when to appoint counsel and cites the case of *Kinsella v. United States*, 361 U.S. 234, among others, as authority. There it was held by this Court that the Armed Forces have no *power or jurisdiction* to try dependents accompanying servicemen overseas during peacetime for non-capital offenses. It was shown that military jurisdiction was based upon status rather than the nature of the offense. Since the Court had already ruled that military tribunals had no jurisdiction in capital cases, under similar circumstances, *Reid v. Covert*, 354 U.S. 1, it followed that no jurisdiction existed, irrespective of the gravity of the crime involved.

In objecting to the "distinction" between capital and non-capital crimes in the right to counsel cases, Petitioner makes the mistake of confusing the rule with its application. *Powell v. Alabama* did not require automatic appointment in all capital cases. It was meticulously limited to its own facts. *Betts v. Brady* was merely an extension of the *Powell* rule to cases less than capital. Under the rule of these two cases, a defendant, to show a denial of counsel, was required to establish circumstances which operated to deny him a fair trial. In the application of the rule, the fact that a charge is capital has become one of the factors in determining whether a petitioner should have been given counsel. Automatic assignment in death cases has now become an almost inflexible requirement, under the *Powell-Betts* rule, not because capital cases are necessarily more complex, but

because (1) all capital crime states have statutes requiring appointment in such cases and (2) courts have recognized the finality of the death penalty and the procedural distinction which many states make between capital and non-capital crimes. Some legislatures have placed the death penalty in the hands of the jury rather than the judge. Indictment by grand jury is provided in capital but not in non-capital cases, in many instances. Some state laws require that capital cases be tried before a larger petit jury than is provided for non-capital cases. When a man is faced with a non-capital charge there is always the chance that he may obtain probation or, eventually, parole. These and many more distinctions between the two categories of offenses support the tendency of the courts to require automatic appointment in all death cases, but not in cases less than capital.

Respondent submits that *Betts* and the cases which have followed provide a clear, consistent and operable standard for the states to follow in applying the due process clause of the Fourteenth Amendment in right to counsel cases.

E. Although States Now Provide For Appointment In Many Instances, The Rights So Provided Have Not Generally Been Accepted As Being Fundamental Or Constitutional In Character.

An examination of the constitutions, statutes, and court rules which have been adopted by the various states and the cases which have construed these provisions will reflect that, although all states have made provision for appointment in some instances, there is no general concensus that a right to automatic appointment in all cases, or even in all felony cases, is of a fundamental

or constitutional character. Some states have required appointment for indigents in capital cases. Some have provided automatic free counsel in felonies, and a very few have extended the right to misdemeanors. The means by which counsel is provided vary from state to state. Some make such provision by court rule and others by statute. Some state courts have construed the right to appointment as having no constitutional basis, while stating that their constitutions only guarantee the right to employ counsel. Others have held that the right to automatic appointment for indigents is of a constitutional nature. There is, thus, no general or consistent feeling among the states as to the nature and scope of the right to appointed counsel. For a short summary of the laws, rules and cases of the various states on this subject, see Appendix B, *infra*.

F The Sixth Amendment, As Construed In *Johnson v. Zerbst*, Should Not Be Made Applicable Against The States Through The Due Process Clause Of The Fourteenth Amendment.

The Sixth Amendment provides that "in *all criminal prosecutions*, the accused shall enjoy the right . . . to have the assistance of counsel for his defense" (emphasis supplied). The underlined words contemplate misdemeanor as well as felony cases. Consequently, if the counsel provision of the Sixth Amendment should be made applicable as against the states, counsel would be automatically required in all cases regardless of their triviality. As Mr. Justice Roberts said in *Betts v. Brady*, *supra*, at 473:

> "To deduce from the due process clause a rule binding upon the states in this matter would be to impose upon

them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: 'Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it.'

Petitioner urges the court to abolish any distinction in the *Betts* rule between capital and non-capital cases. If there can be no distinction between capital cases and non-capital felonies, by the same token there can be no differentiation between felonies and misdemeanors.

If the requirements of the Sixth Amendment as presently construed should be extended to minor cases, this requirement would impose an enormous burden on members of the Bar who might be called upon to defend such charges. Also, such an imposition would encourage those charged with misdemeanors to plead not guilty and, consequently, more time would be consumed in the trial of minor cases. The entire undertaking would result in unnecessary expense to tax payers.

Mr. Justice Roberts also commented in *Betts v. Brady*, at p. 473, as follows:

"... indeed it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner logic would require the furnishing of counsel in civil cases involving property."

The Fourteenth Amendment prohibits states from depriving persons of life, liberty, or property without due process of law. If this Court imposes a rigid requirement regarding the automatic appointment of counsel instead of following the present case by case method of review, the new requirement could not be limited only to criminal felony cases, nor could it be limited to crimes. Since the due process clause places life, liberty, and property on an equal plane, an inflexible counsel appointment rule promulgated by this Court would logically have to apply in civil cases as well as criminal causes. The rule would apply in federal as well as in state courts, as the due process clause of the Fifth Amendment would, presumably, make the new rule applicable against the federal government as well as against the states. Further, in civil cases, counsel would have to be appointed for indigent plaintiffs as well as defendants, since it may be necessary for them to initiate proceedings, in some cases, to prevent deprivation of property of liberty without due process of law.

To reject the *Betts* rule is to impute to judges a lack of ability and integrity which we should not accept as a major premise. As this Court said in *Gibbs v. Burke*, 337 U.S. 773, 780:

> ". . . the fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. The primary duty falls on him to determine the accused's need of counsel at arraignment and during trial. He may guide a defendant without a lawyer past the errors that make trials unfair . . . ."

Let us assume the case in which the trial judge protects every right of the accused, by insuring that the defendant has ample opportunity to procure his witnesses and prepare his defense

and by interposing motions at the trial on the defendant's behalf, if he fails to do so, to prevent any waiver of procedural or evidentiary rights. Or let us suppose the case where a wise and fair judge accepts a plea of guilty only after carefully explaining all his rights to the accused. In such case, where the court obviously provides a fair hearing for the defendant, who can say that the *Palko*, *Hebert* or *Holden v. Hardy* tests of due process have not been fully met?

A fallacy in some arguments is the premise that every defendant who enters a criminal court is entirely unqualified to handle his own defense. This premise evades the inescapable fact that some defendants are more competent in the field of criminal law than are some lawyers. Some lawyers never practice criminal law; many do no courtroom work. If *Betts* should be overruled, lawyers in those areas that are forced to resort to the appointment system will in some cases be less familiar with the criminal courtroom and its procedures than some of the indigents they defend.

In the event that automatic appointment of counsel would be required in all state courts, some states or areas in those states will be forced into using an appointment system of some type. Reginald Heber Smith, in the book, *Justice and the Poor*, p. 114, said:

> "The assignment of counsel in criminal cases, except when the offense charged is murder, has been a general failure . . . . As a system, both in plan operation, it deserves unqualified condemnation."

Smith reasoned that appointed counsel in murder cases work harder because the case generally receives newspaper publicity

and because of the realization that they have a man's life in their hands. Very frequently the circumstances of a non-capital charge may be revolting, and the prisoner charged with such crime may arouse no sympathy in the community. Smith also pointed out that the average lawyer cannot afford to give a thorough defense. He cannot afford to pay for investigators and other experts out of his own pocket, which he would, of necessity, be required to do in those states whose legislatures fail to provide for reimbursement.

"Incorporation" of the Sixth Amendment counsel provision, as presently construed, into the due process clause of the Fourteenth Amendment would not solve the problem of persons who are able to pay a lawyer a small amount, but who are unable to purchase *adequate* representation. Poor persons who get into a hospital sometimes get better treatment than the person of moderate means. That might happen in some cases in the courts.[56]

It has been argued that an inflexible counsel appointment requirement, if imposed on the states, will halt the flood of litigation concerning the right to counsel. This, however, is an unrealistic assumption. To begin with, reversal of *Betts v. Brady* would create myriad and complex new legal questions regarding the right to counsel in misdemeanor and civil cases, as well as questions concerning the significance of our federal system. Also, an examination of recent cases under Criminal Law, key number 641, and Constitutional Law, key number 268, in West Publishing Company's Decennial Digest System, will reflect

56. See Kadish and Kimball, "Legal Representation of the Indigent in Utah," 4 Utah L. Rev. No. 1, p. 198.

that an increasing trend in right to counsel cases is for prisoners to attack their sentences on the grounds of *inadequate* representation. This problem of ineffective representation will exist regardless whether we follow *Betts* or a new rule.

This Court's decision in *Mapp v. Ohio*, 367 U.S. 643, does not furnish, by analogy, any basis for making the counsel provision of the Sixth Amendment applicable against the states. In *Boyd v. United States*, 116 U.S. 616, this Court said that the search and seizure provision of the Fourth Amendment took its origin in the safeguards which had grown up in England. That right has firm basis in the common law. In *Elkins v. United States*, 364 U.S. 206, 217, Mr. Justice Stewart said, speaking of the exclusionary rule:

> "Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

Adoption of the exclusionary rule in *Mapp* was necessary in order to prevent the right to be free from illegal searches and seizures, a right having a firm foundation in the common law, from being a hollow, meaningless, and ineffective guaranty. The Sixth Amendment counsel provision as now construed has no such firm historical basis.

The Sixth Amendment, as construed in *Johnson v. Zerbst*, should not be made applicable to the states through the due process provision of the Fourteenth Amendment.

G. Automatic Appointment Of Counsel For Defendants In All Criminal Cases Should Not Be Required Under The Equal Protection Clause Of The Fourteenth Amendment.

In *Griffin v. Illinois*, 351 U.S. 12, this Court held that a state may not deny appellate review solely because of poverty. There, by a statute, Illinois had made it virtually impossible for an indigent to obtain a review of his conviction. In effect, the state had blocked indigents from entering the appellate courts just as effectively as if it had required a prohibitive filing fee. The *Griffin* case constitutes a reaffirmation of the doctrine announced in *Barbier v. Connolly*, 113 U.S. 27, 31, to the effect that all persons "should have like access to the courts of the Country for the protection of their persons and property."

To comply with the *Griffin* case, a state must not close the courtroom door to anyone on account of his poverty. However, the *Griffin* case does not require that states take affirmative action to equalize economic conditions existing between its citizens and over which it has no control. Mr. Justice Black said, in the majority opinion, at page 20:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bills of exceptions or other methods of reporting trial proceedings could be used in some cases. The Illinois Supreme Court appears to have broad power to promulgate rules of procedure and appellate practice. We are confident the State will provide corrective rules to meet the problem which this case lays bare."

As the above quoted portion of the majority opinion indicates, states need not provide indigents with the exact same advantages which are available to those who have the purchasing power of money.

If automatic appointment of counsel in all cases should be required by this Court under the equal protection clause of the Fourteenth Amendment, such requirement would open a veritable "Pandora's Box", which would cause an enormous volume of litigation and which would cause repercussions in all fields of law. For instance, if a state can be required to provide counsel in every criminal trial, under that clause, it can just as logically be argued that a state should provide counsel in appeals and in post-conviction proceedings. Also, under such a construction of the Fourteenth Amendment, states would logically be required to provide an indigent with bail, with the services of investigators, psychiatrists, etc., in criminal proceedings, since those things are available to the rich man. In civil proceedings and in many other areas of life, a construction of the Fourteenth Amendment, similar to that given the Sixth Amendment, would create many difficulties and problems which were never dreamed of by the framers of the equal protection clause.

H. The Practical Implications Involved In This Case Require Adherence To The Doctrine Of *Betts v. Brady*.

To overrule *Betts v. Brady* would be to create multifold new problems in the fields of criminal and constitutional law. As already indicated, the imposition of an inflexible rule that the states appoint counsel in all cases would raise questions which would cause a flood of litigation in federal and state tribunals. The *Mapp* case, *supra*, which involved an appeal from the state court, has been held to be essentially prospective in operation. There can be no doubt that it is the duty of state courts to follow the *Mapp* holding in all trials taking place after June 19, 1961. (The date of that decision). *People v. Loria*, (N.Y.),

179 N.E. 2d 478. As to cases arising prior to *Mapp*, in *United States v. Fay*, 199 F. Supp. 415, it was pointed out that state courts should be afforded the initial opportunity to evaluate any possible retroactive effect that the *Mapp* decision may have on their criminal procedures.

In *State v. Evans*, (N.J.), 183 A. 2d 137, the court held that although application of the decision in the *Mapp* case is essentially prospective, it is not necessarily inapplicable merely because an illegal search antedated the decision; however, its retrospective effect is circumscribed by potential limits and is subordinate to essential justice both to the individual and to the community. Collateral attack, or the equivalent, on pre-*Mapp* convictions has been denied in *State v. Long*, (N.J.), 177 A. 2d 609; *People v. Muller*, (N.Y.), 182 N.E. 2d 99; *People v. Figueroa*, 220 N.Y.S. 2d 131; *People v. Oree*, 220 N.Y.S. 2d 121; and *Hall v. Warden*, 201 F. Supp. 639. Regarding the effect of *Mapp*, see also *United States v. La Vallee*, 206 F. Supp. 679; and *United States ex rel Gregory v. People of New York*, 195 F. Supp. 527.

In sum, it makes a great deal of difference whether a case comes to this Court after an appeal or from a collateral proceeding in the state courts. A decision by this Court reversing a state court appeal is essentially prospective in operation, while the contrary is true with respect to reviews of collateral proceedings. If the instant case involved an appeal instead of a collateral attack upon his sentence by petitioner, a reversal overruling *Betts v. Brady* would allow the state courts some flexibility in determining whether and in what circumstances such a decision should apply retroactively.

However, since Gideon attacked his sentence by way of habeas corpus, a decision reversing the ruling of the court below would necessarily be retroactive in effect. (In *Eskridge v. Washington Prison Bd.*, 357 U.S. 214, this Court's holding in *Griffin v. Illinois*, which involved a post conviction proceeding, was applied retrospectively.)

After certiorari was granted in this case, a survey of all its prisoner files or records was made by the Division of Corrections of the State of Florida, to determine the number of prisoners incarcerated who had not been represented by counsel in the proceedings which resulted in their convictions. That survey resulted in these findings:

1. As of June 30, 1962, the Division of Corrections had in custody 8,000 prisoners.
2. Of this group, 4,065 entered pleas of guilty with no counsel.
3. Of this group, 1,504 entered pleas of guilty and were represented by counsel when they entered their pleas.
4. 477 of this group entered pleas of not guilty and were not represented by counsel.
5. 975 entered pleas of not guilty and were represented by counsel.
6. As to the remaining 979, the records were either so old that the information needed was not contained in them, or for some other reason the Division was unable to ascertain whether those prisoners were represented by counsel.

The above figures reflect that approximately 65% of those whose records were available were not represented by counsel in the proceedings resulting in their convictions. If this percentage is true, it appears that, as of June 30, 1962, the Division

had in custody approximately 5,200 prisoners who had not been represented by counsel in the trial court. On November 30, 1962, the Division had 7,836 prisoners in custody. Again, applying the 65% figure, approximately 5,093 unrepresented prisoners were in custody as of that date.

If *Betts* should be overruled by this Court in the instant case, as many as 5,093 hardened criminals may be eligible to be released in one mass exodus in Florida alone, not to mention those in other states where automatic appointment of counsel in non-capital cases was not provided for at one time or another. Of course, some of them may be re-tried, but it is often impossible to re-try a man due to practical difficulties in locating witnesses, marshalling evidence, etc. If the instant case should be reversed and the new rule made retroactive, many of these 5,093 criminals will go free, without the possibility of a retrial. Florida and other states have, for the past twenty years, followed this Court's decisions in the right to counsel area in good faith. In view of this good faith reliance on the *Betts* rule by Florida and other states, and in recognition of the danger to society in the event that the prison doors of the land are opened by such a decision, it is urged that the doctrine of *Betts v. Brady* be adhered to.

If this Court should decide to overrule *Betts*, Respondent respectfully requests that it be accomplished in such way as to prevent the new rule from operating retrospectively. (See concurring opinion of Mr. Justice Frankfurter in *Griffin v. Illinois, supra; Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358; *Warring v. Colpoys*, 122 F. 2d 642, 136 A.L.R., 1025; *State v. Smith*, (*N.J.*), 181 A. 2d 176).

CONCLUSION

For the reasons stated, the doctrine of *Betts v. Brady* should be adhered to, and the judgment of the Court below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, certify that on the day of December, 1962, I served copies of the foregoing Brief for Respondent upon Petitioner by mailing the same by air mail with postage prepaid to Petitioner's counsel, the Honorable Abe Fortas, 1229 19th Street, Washington 6, D.C.

Richard W. Ervin
Attorney General of Florida

APPENDIX A

Constitutional and Statutory Provisions Involved

Amendment VI, U. S. Const.:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 79.01, Florida Statutes:

"Whenever any person detained in custody, whether charged with a criminal offense or not, shall, by himself or by some other person in his behalf, apply to the supreme court of the state or to any justice thereof, or to any circuit judge, in vacation or in term time, for a writ of habeas corpus, and shall show by affidavit or evidence probable cause to believe that he is detained in custody without lawful authority, the court, the justice or judge to whom such application shall be made forthwith shall grant the writ, signed by himself, directed to the person in whose custody the applicant is detained, and returnable immediately before such court, justice or judge, or any of said courts, justices or judges, as the writ issued may direct."

Chapter 61-639, Laws of Florida, 1961:

"AN ACT providing for the appointment of a public defender by the Board of County Commissioners in all of the

Counties of Florida having a population of not less than three hundred ninety thousand (390,000) and not more than four hundred fifty thousand (450,000) according to the latest official state-wide decennial census, providing for the qualifications, duties and compensation of said public defender, providing for the appointment of assistant public defenders, investigators and clerical assistance, providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The Board of County Commissioners in all counties of Florida having a population of not less than three hundred and ninety thousand (390,000) and not more than four hundred and fifty thousand (450,000), according to the latest official state-wide decennial census, shall appoint and employ a public defender to serve at the pleasure of the Board of County Commissioners. Such public defender shall be a licensed practicing attorney of the state of Florida and shall receive compensation as fixed by the Board of County Commissioners, but such compensation shall be not less than seven thousand five hundred dollars ($7,500.00) per year.

Section 2. The public defender shall give priority and preference to his duties under the provisions of this act and may engage in the private practice of law only to the extent that it will not interfere or prevent the performance of his duties as public defender of any such county, and shall not engage in the private practice of criminal or quasi-criminal law. The public defender shall, where justice requires, represent, without charge, any indigent person who is charged with a crime which may be tried in the criminal court of record of said county and shall represent said indigent person at all stages of the proceedings, including the preliminary examination or hearing

although the same may be in a court other than the criminal court of record. The public defender shall prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice. Nothing herein shall be construed as interfering with the inherent right of the court to appoint counsel in proper cases.

Section 3. The public defender shall be authorized to employ at least one assistant public defender who shall also be a practicing attorney of the state of Florida, and in addition thereto at least one investigator. The public defender may employ additional assistant public defenders and additional investigators with the consent of the Board of County Commissioners. The public defender may also hire secretaries and other clerical help. The salaries and fees of said assistant public defenders, investigators, and secretaries shall be fixed by the Board of County Commissioners.

Section 4. The selection of said public defender shall be made by the Board of County Commissioners with the advice of the circuit judges and judges of the criminal court of record of said counties.

Section 5. All payments of money herein provided to be made are declared to be payments for county purposes of any such county, being payable out of the funds of said county, and any and all facilities to be required to be furnished hereunder, if any, are likewise declared to be for the county purpose of said county.

Section 6. All laws and parts of law in conflict herewith are hereby repealed.

Section 7. If any part or parts of this act shall be held unconstitutional such holdings shall not affect the validity of the remaining parts of this act.

Section 8. This act shall take effect on October 1, 1961.

Became a law without the Governor's approval.

Filed in Office Secretary of State June 22, 1961."

APPENDIX B

Constitutions

All states except Virginia have specific constitutional provisions regarding the right to counsel. They provide substantially as follows:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by (with) counsel.

Arizona	II.	24.
Colorado	II.	16.
Idaho	I.	13.
Illinois	II.	9.
Missouri	I.	18.
Montana	III.	16.
North Dakota	I.	13.
Utah	I.	12.

In all criminal prosecutions the accused shall have (enjoy) the right to the assistance of counsel for (or in) his defense.

Alaska	I.	11.
Hawaii	I.	11.
Michigan	II.	19.
Minnesota	I.	6.
New Jersey	I.	10.

In all criminal prosecutions the accused shall have (enjoy) the right to be heard by himself and his counsel.

Arkansas	II.	10.
Delaware	I.	7.
Pennsylvania	I.	9.
Tennessee	I.	9.
Vermont	I.	10.

In all criminal prosecutions the accused has (shall have) the right to be heard by himself and counsel.

Indiana	I.	13.
Kentucky	II	
Oklahoma	II.	20.
Oregon	II.	11.
Wisconsin	I.	7.

In all criminal prosecutions the accused shall be heard by himself, or counsel, or both.

Florida	D.R.	11.
Mississippi	III.	26.
Texas	I.	10.

In all criminal prosecutions the accused shall have the right to defend in person and by counsel.

South Dakota	VI.	7.
Wyoming	I.	10.

(In any trial) in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions.

Nevada	I.	8.
New York	I.	6.

In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel.

Nebraska	I.	11.
Washington	I.	22.

In all criminal prosecutions, the accused has the right to be heard by himself and counsel or either.

Alabama	I.	6.

In all criminal prosecutions, in any court whatever, the party accused shall have the right to appear in person and with counsel.

California I. 13.

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel.

Connecticut I. 9.

Every person charged with an offense shall have the privilege and benefit of counsel.

Georgia I. 1.5.

In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to have the assistance of counsel.

Iowa I. 10.

In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel.

Kansas B.R. 10.

In all criminal prosecutions the accused shall have the right to defend himself, (and) have the assistance of counsel.

Louisiana I. 9.

In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election.

Maine I. 6.

In all criminal prosecutions every man hath a right to be allowed counsel.

Maryland D.R. 21.

Every subject shall have a right to be fully heard in his defense by himself or his counsel at his election.

Massachusetts D.R. 12.

Every subject shall have a right to be fully heard in his defense by himself and counsel.

New Hampshire I. 15.

In all criminal prosecutions the accused shall have the right to appear and defend himself in person and by counsel.

New Mexico II. 14.

In all criminal prosecutions every person charged with crimes has the right to have counsel for defense.

North Carolina I. 11.

In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel.

Ohio I. 10.

In all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel in his defense, and shall be at liberty to speak for himself.

Rhode Island I. 10.

In all criminal prosecutions the accused shall enjoy the right to be fully heard in his defense by himself or his counsel or by both.

South Carolina I. 18.

In trials of crimes and misdemeanors the accused shall have the assistance of counsel.

West Virginia III. 14.

Statutes and Court Rules

I. States Which Do Not Make Provision For Automatic Appointment of Counsel In All Non-Capital Felony Cases

A. Statutes

Alabama	Tit. 15, §318
Florida	Fla. Stat. 909.21 (It should be noted that Florida has provided public defender systems in some of its larger counties, for non-capital cases. See Chapter 61-639, Laws of Florida, 1961, Appendix A, which created the Hillsborough County system.)
Hawaii	Rev. Laws of Hawaii, §253-5 (In felony cases in a circuit court, trial judge "may" assign counsel.)
Maine	Me. Rev. Stat., c., 148, §11 (Counsel "may" be assigned by the superior court in any criminal cases, and shall be assigned in all cases punishable by imprisonment for life.)
Mississippi	Miss. Code Ann. §2505

New Hampshire	N.H. Rev. Stat. §§604:1, 604:2. (Appointment may be made for persons held for the grand jury charged with an offense, the punishment whereof may be three years imprisonment, if the court is of the opinion that injustice may be done if appointment is not made.)
North Carolina	N.C. Gen. Stat. §15-4.1
Pennsylvania	Purdon's Pa. Stat., Tit. 19, §§783, 784.
South Carolina	S.C. Code of Laws, §17-507.
Vermont	13 Vt. Stat. Ann. §6503

B. Court Rules:

Delaware	Superior Court Rules—Rule 44 (Gives court discretion in non-capital cases)
Maryland	Md. Rules of Procedure, Criminal Causes, Rule 723, b. (in all capital cases and other "serious cases").

II. States Which Make Some Provision For Appointment In All Non-Capital Felony Cases

A. Statutes providing for appointment in cases arising in certain courts:

Connecticut	Gen. Stat. of Conn. §54-80 (superior court of common pleas)
Idaho	Idaho Code Ann. §§19-1512, 19-1513 (district court)

Oregon	Ore. Rev. Stat. §135.320 (circuit court)
Rhode Island	Title 12, Chapt. 15, Gen. Laws of R.I. (superior court)
South Dakota	S.D. Code 34.1901 (circuit, municipal or county court)

B. Statutes providing for appointment at arraignment without specifically limiting such appointment to any category of offenses:

California	Calif. Penal Code §987
Iowa	Iowa Code Ann. §775.4 (This statute evidently does not apply in minor cases, which are tried summarily. See Art. I, §11, Const. of Iowa)
Kansas	Gen. Stat. of Kansas, §62-1304
Montana	Rev. Code of Montana, §94-6512
Nevada	Nev. Rev. Stat. §174.120
New York	N.Y. Code of Crim. Pro. §308
Oklahoma	22 Okla. Stat. §464
South Dakota	S.D. Code §34.3506
Utah	Utah Code Ann. §77-22-12 (Right appears to apply in misdemeanors, but as a practical matter, very few misdemeanor defendants are arraigned and the right in those cases is very limited. Kadish and Kimball, "Legal Representation of the Indigent in Criminal Cases in Utah", 4 Utah L. Rev. pp. 202, 203.)

C. Statutes which appear to provide for appointment of counsel only in felony cases:

Arkansas	Ark. Stat. §43-1203
Illinois	Ill. Rev. Stat. c. 110, §101.26 (2)
Louisiana	La. Rev. Stat. §15-143
Missouri	Mo. Rev. Stat. §545.820
Nebraska	Rev. Stat. of Neb. §29-1803
New Mexico	N.M. Stat. Ann. §41-11-2
Ohio	Ohio Rev. Code §2941.50
Texas	Vernon's Texas Code of Crim. Pro., §494
Virginia	Code of Va., §19.1 - 241
Washington	Rev. Code of Wash., §10.01.110
Wisconsin	Wis. Stat. Ann. §957.26

D. Statutes which, according to their wording, may or do require appointment in some misdemeanor cases:

Kentucky	Ky. Rev. Stats. §455.010
Minnesota	Minn. Stat. §611.07 (felonies or gross misdemeanors)
North Dakota	N.D. Century Code §§29-01-27, 29-13-03.
Tennessee	Tenn. Code §§40-2002, 40-2003.
Wyoming	Wyo. Stat. §7-7

E. The following states provide for appointment by court rule:

Alaska	Rules of Crim. Pro., Rule 39 (b) (Rules govern procedure in superior court in all criminal proceedings and, insofar as they are applicable, in other courts, see Rule 1.)
Arizona	Rules of Crim. Pro., Rule 163 (felonies)
Colorado	Colo. R. Crim. Pro., Rule 44 (felonies)
Illinois	Ill. Supreme Court Rules, Rule 26 (2)
Massachusetts	Rule 10, General Rules of the Supreme Judicial (felonies; also provides for discretionary assignment in lesser cases.)
Michigan	Mich. Ct. R. 35A. (felonies) (See *People v. Bumpus*, 94 N.W. 2d 854)
Missouri	Rule 29.01, Supreme Court Rules (felonies)
New Jersey	Rev. Rules, §1-12-9
West Virginia	Rules of Practice for Trial Courts, Rule IV.

CASES

1. Decisions in the following states reflect that the right to have counsel appointed in all non-capital cases is not of constitutional or fundamental character.

Alabama	Cook v. State, 22 So. 2d 924

Colorado	Kelley v. People, 206 P. 2d 337
Florida	Sneed v. Mayo, 66 So. 2d 865
Illinois	People v. Bute, 72 N.E. 2d 813; People v. Evans, 74 N.E. 2d 708
Iowa	Carpentier v. Lainson, 84 N.W. 2d 32
Maryland	Marvin v. Warden, 129 A. 2d 85; Coates v. State, 25 A. 2d 676
Massachusetts	Dugliese v. Commonwealth, 140 N.E. 2d 476; Commonwealth v. Blondin, 87 N.E. 2d 455; Allen v. Commonwealth, 87 N.E. 2d 192
Michigan	People v. Haddad, 11 N.W. 2d 240; People v. Williams, 195 N.W. 1044
Minnesota	State v. Rigg, 93 N.W. 2d 198; State v. Martin, 27 N.W. 2d 158
Mississippi	Reed v. State, 109 So. 715
Missouri	Edwards v. Nash, 303 S.W. 2d 11
N. Carolina	State v. Hedgebeth, 45 S.E. 2d 563
N. Dakota	Mazakahonni v. State, 25 N.W. 2d 772
Oregon	People v. Delaney, 332 P. 2d 71
Pennsylvania	Commonwealth v. Bannmiller, 171 A. 2d 603; Commonwealth ex rel McGlen v. Smith, 24 A. 2d 1
S. Carolina	State v. Hollman, 102 S.E. 2d 873

S. Dakota	State v. Jameson, 104 N.W. 2d 45, State v. Sweeney, 203 N.E. 460
Texas	Stanfield v. State, 212 S.W. 2d 816, Ex P Johnson, 318 S.W. 2d 66
Vermont	State v. Gomez, 96 A. 490
West Virginia	State v. Yoes, 68 S.E. 181
Wisconsin	State v. Turpin, 38 N.E. 2d 475

II. The following decisions reflect that the right to counsel in capital cases is fundamental.

Arkansas	Thurman v. State, 168 S.W. 2d 833
California	People v. Mattson, 336 P. 2d 937
Georgia	Walker v. State, 22 S.E. 2d 462
Indiana	State v. Allen Circuit Court, 153 N.E. 2d 914
Kansas	Kansas v. Hudspeth, 178 P. 2d 246
Kentucky	Powell v. Commonwealth, 346 S.W. 2d 731
New Jersey	State v. Johnson, 163A. 2d 593
New Mexico	State v. Garcia, 142 P. 2d 552
New York	People v. Waterman, 155 N.E. 2d 445
Ohio	In re Matz, 136 N.E. 2d 430
Oklahoma	Hunter v. State, 288 P. 2d 425

III. The following cases have held that there is no right to appointment of counsel in all misdemeanors

Arkansas	Kirkwood v. State, 136 S.W. 2d 175
Minnesota	State v. Martin, 27 N.W. 2d 158
Nebraska	Kissinger v. State, 25 N.W. 2d 829

CONCLUSION

The above indicates that it has been the considered judgment of the people of the states that appointment of counsel in all felony cases, or in all criminal cases, is not a fundamental right. The matter has generally been deemed one of ligislative or a court rule making policy.